

STIPULATIONS

Stipulations are those as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The Administrative Law Judge found that the claimant was entitled to permanent partial general disability benefits based upon a twenty-eight percent (28%) work disability. The respondent and insurance carrier have requested review by the Appeals Board. Nature and extent of claimant's disability, if any, is the sole issue now before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds as follows:

(1) Claimant is entitled to permanent partial general disability benefits based upon an impairment of function rating of four percent (4%) followed by permanent partial disability benefits based upon a thirty-four percent (34%) work disability.

Claimant claims that he sustained back injury caused by the daily heavy lifting of tools and equipment he regularly used while working for respondent. The Appeals Board agrees with the Special Administrative Law Judge that claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent by a series of mini-trauma culminating on or about May 31, 1992.

Claimant was seen by several physicians and ultimately treated by board-certified physiatrist Lawrence R. Blaty, M.D., from September 1992 through April 28, 1993. Dr. Blaty believes that claimant has sustained a four percent (4%) permanent partial impairment of function to the body as a whole and has restricted him to working in the medium physical demand level of occupations. Dr. Blaty has restricted claimant from lifting greater than fifty (50) pounds on an occasional basis, has advised claimant to avoid lifting while bending or twisting, and has limited the amount of time that claimant can perform sheet metal work to no more than one (1) hour at a time nor more than four (4) hours per day. Dr. Blaty released claimant to return to work on February 14, 1993. Upon his return to work, claimant was advised that he could not work with the restrictions that Dr. Blaty had placed upon him and that he needed to return to the doctor. At claimant's request, Dr. Blaty then removed the restrictions against sheet metal work. Claimant worked approximately two (2) weeks before being placed into the "Warn Pool" where he was working before being laid off on June 8, 1993.

Claimant was evaluated by labor market expert Jerry Hardin. Based upon Dr. Blaty's restrictions, Mr. Hardin believes that claimant has lost thirty to thirty-five percent (30-35%) of his ability to perform work in the open labor market and fifty-nine percent (59%) of his ability to earn a comparable wage. Mr. Hardin's opinion regarding loss of ability to earn a comparable wage is based upon the assumption that claimant is now able to earn \$320.00 per week.

The claimant was also interviewed and evaluated by vocational rehabilitation expert Karen Terrill. Ms. Terrill believes that claimant has lost approximately eight percent (8%) of his ability to perform work in the open labor market and thirty-five percent (35%) of his ability to earn a comparable wage based upon the work restrictions and limitations of Dr. Blaty. As claimant had past experience as a car rental manager, Ms. Terrill believes that

he is capable of returning to that occupation and is able to earn approximately \$10.00 per hour. In arriving at her opinion pertaining to loss of ability to earn comparable wage, Ms. Terrill compared claimant's pre-injury hourly rate of \$15.71 per hour to the \$10.00 per hour wage that Ms. Terrill believes claimant may now earn.

Based upon the evidence presented, the Appeals Board finds that respondent retained claimant in its employ and paid claimant a comparable average weekly wage until the layoff on June 8, 1993. Therefore, the presumption of no work disability provided in K.S.A. 44-510e is applicable from the date of accident until the date of layoff. Claimant is entitled to permanent partial disability benefits based upon the four percent (4%) permanent partial impairment of function rating provided by Dr. Blaty from the date of accident on May 31, 1992, through the date of layoff of June 8, 1993, excluding, of course, the 29.71 weeks during said period that claimant was entitled temporary total disability compensation. As it appears claimant continued to receive his fringe benefits through date of layoff, permanent partial disability benefits through June 8, 1993, will be based upon claimant's average weekly wage excluding the additional compensation items. From a review of the wage information provided, claimant's average weekly wage, excluding additional compensation items, is \$657.91. This figure is computed by subtracting the weekly value of additional compensation items in the sum of \$110.15 from the average weekly wage figure of \$768.06 which includes additional compensation items.

For the period after claimant's layoff commencing June 9, 1993, the Appeals Board finds that claimant is entitled to permanent partial general disability benefits based upon a thirty-four percent (34%) work disability. The Appeals Board finds that claimant's loss of ability to return to the open labor market is twenty percent (20%) which falls between the percentages provided by Ms. Terrill and Mr. Hardin of eight percent (8%) and thirty to thirty-five percent (30-35%), respectively. The Appeals Board finds that claimant's loss of ability to earn comparable wage is forty-eight percent (48%). This figure was derived by comparing claimant's pre-injury stipulated wage of \$768.06 to the \$400.00 per week that the Appeals Board finds that claimant is now capable of earning. In determining claimant's work disability, the Appeals Board has given equal weight to claimant's loss of ability to perform work in the open labor market and loss of ability to earn comparable wage as did the Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). In Hughes, supra, the Court held permanent partial general disability is determined by the extent (percentage) of the reduction of the employee's ability to perform work in the open labor market and the employee's ability to earn comparable wages. The Court in Hughes held that both factors must be considered in light of the employee's education, training, experience, and capacity for rehabilitation. The Appeals Board is not required to weigh these factors equally; however, in this case there appears no compelling reason to give either factor more weight than the other.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated January 26, 1994, is modified as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF THE claimant, Gary D. Jones, Jr., and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety,

Co., for an accidental injury occurring on May 31, 1992, based upon an average weekly wage of \$657.91, the claimant is entitled to 29.71 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$8,586.19 and 23.72 weeks of compensation at the rate of \$17.55 in the sum of \$416.29 for a 4% permanent partial general bodily disability, and based upon an average weekly wage of \$768.06, the claimant is entitled to 361.57 weeks of compensation at the rate of \$174.10 in the sum of \$62,949.34 for a 34% permanent partial general bodily work disability making a total award of \$71,951.82.

As of July 8, 1994, there would be due and owing the claimant temporary total disability compensation for 29.71 weeks at \$289.00 in the sum of \$8,586.19, 23.72 weeks of permanent partial compensation at the rate of \$17.55 per week in the sum of \$416.29, and 56.43 weeks of permanent partial compensation at the rate of \$174.10 or \$9,824.46 for a total due and owing of \$18,826.94 which is ordered paid in one lump sum. Thereafter, the remaining balance in the amount of \$53,124.88 shall be paid at the rate of \$174.10 per week for 305.14 weeks or until further order of the Director.

All other orders of the Special Administrative Law Judge in his Award of January 26, 1994, are affirmed and incorporated herein by reference.

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy J. King, 300 W. Douglas, Suite 430, Wichita, KS 67202
Vaughn Burkholder, 700 Fourth Financial Center, Wichita, KS 67202
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director